Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MIR AIMAL KASI

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

On Petition for a Writ or Certiorari to the

Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

James Coyne King
Counsel of Record
Laurie J. Hurtt
HANIFY & KING
Professional Corporation
One Federal Street
Boston, MA 02110
(617) 423-0400
Counsel for Petitioner

Elwood Earl Sanders, Jr.
Commonwealth of Virginia
Public Defender Commission
701 East Franklin Street
Richmond, VA 23219
(804) 225-3297
Of Counsel

CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Virginia Supreme Court err in ruling that a "person" lacks standing to challenge his seizure by United States officials as unreasonable in violation of the Fourth Amendment when (a) the seizure took place outside the United States, and (b) the person is an alien who has substantial connections with the United States?
2. Does a court within the United States have personal jurisdiction over an alien whose presence was obtained in violation of the mandatory process set forth in an extradition treaty to which the United States is a signatory?
3. Did the Virginia Supreme Court err in refusing to suppress evidence obtained (a) in violation of the consular notification provision of the Vienna Convention on Consular Relations or (b) as the fruit of the violation of an extradition treaty?
4. Under this Court's decision in United States ex rel. Touhy v. Ragen and the doctrine of sovereign immunity, do federal agencies have an absolute right to refuse to comply with subpoenas for exculpatory and mitigating evidence issued by state courts in a criminal case?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of Virginia to review the judgment below.

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 508 S.E.2d 57 and 256 Va. 407, and is located in the Appendix submitted herewith at page 1. The Order denying petitioner's motion for a rehearing is not officially reported. Record Nos. 980797, 980798, Circuit Court No. 791148. A copy of the Order is in the Appendix at page 24.

JURISDICTION

The Final Judgment of the Supreme Court of Virginia was entered on January 8, 1999, after that court denied petitioner's motion for rehearing. This Court granted petitioner's Application for Extension of Time to File Petition for Writ of Certiorari in Application No. A-748 and extended the time for petitioner to file the Petition until May 7, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Extradition Treaty between the United States and the Republic of Pakistan, 47 Stat. 2122 (1931)

The text of the Treaty is set forth in the Appendix at page 71.

Act XXI of 1972 of the Republic of Pakistan, The Pakistan Code, Volume XVIII

The text of the Extradition Act, 1972 is set forth in the Appendix at page 87.

Vienna Convention on Consular Relations, 21 U.S.T. 77 (1963)

The pertinent text from the Vienna Convention is set forth in the Appendix at page 100.

5 U.S.C. § 301

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

28 C.F.R. §§ 16.21-16.29

The text of the Federal Bureau of Investigations' Production and Disclosure in Federal and State Proceedings, 28 C.F.R. §§ 16.21-16.29, is set forth in the Appendix at page 103.

32 C.F.R. §§1905.1-1905.4

The text of the Central Intelligence Agency's Production of Official Records or Disclosure of Official Information in Proceedings Before Federal, State or Local Governmental Entities

of Competent Jurisdiction, 32 C.F.R. §§ 1905.1-1905.4, is set forth in the Appendix at page 116.

STATEMENT OF THE CASE

The Abduction

On June 15, 1997, at four in the morning, four unidentified men wearing native clothing rushed into petitioner's hotel room in Pakistan and, with guns drawn, wrestled petitioner to the ground. Kasi v. Commonwealth of Virginia, 508 S.E.2d 57, 60-61 (Va. 1998), Appendix at 5. The four men handcuffed, gagged, shackled and hooded petitioner, dragged him from the room, and transported him in a vehicle for approximately 45 minutes to an unknown location. Id. at 61, Appendix at 5. While in the vehicle, one of the men identified himself as an agent of the United States Federal Bureau of Investigation ("FBI"). Id.

When the vehicle stopped, the four men grabbed petitioner—still handcuffed, shackled, and hooded—and forced him onto an airplane which flew for approximately an hour to another unknown location. Id.; Appendix at 167-168. After the plane landed, petitioner was kept on the plane for another hour and a half. Appendix at 168. Eventually, petitioner was moved from the plane to yet another vehicle and driven another half hour—still handcuffed, shackled and hooded—to an unidentified facility controlled by Pakistanis. Kasi, 508 S.E.2d at 61, Appendix at 6.

Petitioner was held in a small, barred and locked cell at the facility for the next two days. Id.; Appendix at 171-172. At all times during the two days, petitioner was kept in the cell, handcuffed and under the constant supervision of the FBI agents.

Kasi, 508 S.E.2d at 61, Appendix at 6; Appendix at 172, 173-174. The cell had no windows and there was no way for petitioner to tell time. Appendix at 171. The temperature in the cell was well over eighty degrees, and petitioner had no access to anyone other than FBI agents and the unidentified individuals who delivered petitioner food. Appendix at 173-174, 176.

On June 17, 1997, petitioner was taken from the facility in the custody of the FBI agents and transported to an airfield from which he and the FBI agents were flown on a twelve-hour flight to the United States.[1] Kasi, 508 S.E.2d at 61, Appendix at 6. Upon arrival in the United States, the FBI agents turned petitioner over to Virginia law enforcement authorities who arrested him for the murder of two agents of the Central Intelligence Agency ("CIA") in Virginia on January 25, 1993. Appendix at 423-424.

At no point at or prior to his arrest did the FBI agents or the Virginia authorities tell petitioner that he had the right to contact a representative of the Pakistani consulate. Kasi, 508

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[1] It is believed that the United States negotiated petitioner's release from the facility with those that controlled the facility, and eventually gave those people or their principals money (up to $3.5 million) and/or property in exchange for petitioner's release. Appendix at 470, 475, 479. It is unclear from the record what, if any, connection the people who controlled the facility had with the Federal Government of Pakistan or with Pakistan's foreign affairs personnel. However, the four FBI agents apparently entered Pakistan surreptitiously and did not provide the Federal Government of Pakistan with any documents relating to their entry into, activities in or exit from Pakistan.

S.E.2d at 62, Appendix at 9. In fact, the Commonwealth of Virginia and the petitioner stipulated in the trial court that the petitioner was not informed of his right to contact the consulate until July 3—some two weeks after his arrival in the United States. Id. At no time after the seizure of petitioner did the agents or any official of the United States requisition the Federal Government of Pakistan for the extradition of petitioner from Pakistan, as required by the Pakistani Extradition Act, 1972.[2] Id. That law and the Extradition Treaty it implemented were at all times relevant hereto the supreme law of the United States. U.S. CONST. art. VI, cl. 2.

Petitioner was tried by jury in November 1997 over ten days. Kasi, 508 S.E.2d at 59, Appendix at 2. The jury found petitioner guilty and recommended death based on the "vileness" of the crime.[3] Id. at 59-60, Appendix at 2-3. The trial court, after reviewing a post-sentencing report which did not contain any information from the files of the FBI or CIA as subpoenaed by petitioner, agreed with the jury's determination and sentenced petitioner to death. Id. at 60, Appendix at 3.

Petitioner's Life in the United States

Petitioner is a native and citizen of Pakistan. Kasi, 508 S.E.2d at 61, Appendix at 6. During the Afghanistan War, the CIA, through the ISI, Pakistan's intelligence and national security

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[2] The Commonwealth of Virginia and petitioner stipulated that "the seizure in Pakistan was not made pursuant to any Pakistani paper or document, which would allow him to be seized under the laws of Pakistan." Kasi, 508 S.E.2d at 62, Appendix at 9.

[3] VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4(c).

service, sought the aid and assistance of the petitioner and members of his family, including his father, uncle and other members of his tribe. Appendix at 483. After the war, one of petitioner's family members was killed—the CIA is believed to be responsible. Id.

Sometime in late 1990 or early 1991, petitioner made preparations to move to the United States. Appendix at 280, 460-461. As part of these efforts, petitioner obtained a business visa from United States authorities in Pakistan and secured $100,000 of capital from his share of the family business for use in the United States. Appendix at 280, 461. Petitioner entered the United States in February 1991 on the business visa. Id. at 280. The visa expired on March 30, 1991. Id. at 283. Sometime after March 30, 1991, petitioner secured an amnesty and work permit from the United States Immigration and Natural Services ("INS"), Appendix at 325, and continuously resided at one location in Northern Virginia until January 1993.[4] Kasi, 508 S.E.2d at 59, Appendix at 1; Appendix at 246-247, 251.

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[4] The INS files regarding petitioner's immigration status were reported as lost when petitioner requested them in this case, until an INS employee, called to testify on behalf of the prosecution at the hearing on the Motion to Suppress Evidence secured in violation of the Fourth Amendment, was able to locate copies of a few documents from the files that were important to the Commonwealth's opposition to the Motion. Appendix at 288, 294-295, 298-299. The INS never found the other documents from the file. Petitioner believes that the "missing" documents would show a connection between the CIA's efforts in the Afghanistan War and CIA involvement with the amnesty and work permit issued to petitioner by the INS.

When petitioner first entered the United States, he lived in Virginia and worked occasionally for Ace Movers and Rentals. Appendix at 250-251. In the summer of 1991, petitioner helped a Pakistani friend finance the purchase of a truck for his friend's moving business. Id. at 258-259. Over the next year, petitioner worked with his friend, helped finance the operations, and developed his business skills, such as how to manage and operate a moving business. Id. at 260-261.

Petitioner next entered into a contract to work for Excel Courier, a delivery and transport company in Northern Virginia. During his residency in Virginia, petitioner held a Virginia driver's license, maintained car insurance, and otherwise engaged in activities associated with his living and working in the United States. Kasi, 508 S.E.2d at 59, Appendix at 1-2; Appendix at 269-270. On January 25, 1993, two CIA agents were shot to death near the entrance to the CIA headquarters. Kasi, 508 S.E.2d at 59, Appendix at 1. Other than the statement given by petitioner after he was abducted by the four FBI agents in Pakistan, no direct evidence placed the petitioner at the murder scene. See id. at 61, Appendix at 7.

Between January 1993 and June 1997, the CIA and FBI conducted an extensive investigation into the murders of the two CIA agents, both in the United States and abroad. Id. at 61, Appendix at 6. The federal agents acted as investigators for the Commonwealth attorney for Fairfax County. See id.; Appendix at 423-424. As part of the investigation, the federal agents paid unidentified persons in excess of two million dollars for

information and traveled to multiple countries before tracking petitioner down in Pakistan. Kasi, 508 S.E.2d at 61, Appendix at 6; Appendix at 470, 475, 479.

The Proceedings in Virginia

As part of discovery in the trial court, petitioner caused subpoenas to be served on the FBI and CIA seeking documents concerning him, his family and the killings, including documents relating to the FBI and CIA hunt for petitioner, his capture by the FBI, his family's history with the CIA, the killing of his family member and the CIA's involvement with his amnesty permit issued by the INS. Appendix at 403, 411-413, 421-422. The FBI and CIA refused to produce the requested documents.[5] Id.; Appendix at 399, 402, 414-417. The trial court denied petitioner's requests to enforce the subpoenas and compel the FBI and CIA to produce the documents stating: "I don't find there's any jurisdiction of a state court to hold a federal official in contempt for failing to respond to a state court's subpoena. And for that, and the other reasons stated by [the FBI and CIA's attorney], the rule to show cause is dismissed." Id. at 64, 67. The Supreme Court of Virginia summarily affirmed the trial court's rulings. Kasi, 508 S.E.2d at 60, Appendix at 4, 5.

Prior to trial, petitioner also moved the Court to suppress evidence stemming from the FBI's seizure of him based on the unreasonableness of the seizure. Id. at 63, Appendix at 12;

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[5] Petitioner followed the regulatory procedures established by the FBI and CIA but did not obtain the requested documents for use in this case.

Appendix at 324-329. The trial court, relying on this Court's opinion in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), found that petitioner must prove that he has substantial voluntary contacts with the United States to claim the protections of the Fourth Amendment: "[Petitioner] has to make a prima facie case to show that he is entitled to claim that protection and at least a prima facie case that it was violated." Appendix at 43. After conducting a hearing at which both petitioner and the Commonwealth of Virginia presented testimony, Id. at 241-323, the trial court ruled that petitioner did not have standing to challenge the FBI's seizure of him as unreasonable. Id. at 40, 47-52.

The Supreme Court of Virginia upheld the trial court's ruling. Kasi, 508 S.E.2d at 63, Appendix at 12. Significantly, the Virginia Supreme Court did not assess petitioner's contacts with the United States, but rather reasoned that the Fourth Amendment is inapplicable to federal government conduct towards aliens that takes place outside of the United States.[6] See id.

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[6] The Supreme Court of Virginia reasoned as follows: "In United States v. Verdugo-Urquidez [citation omitted], the Supreme Court held: 'The available historical data show...that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.' The Court also said, 'There is likewise no indication that the Fourth Amendment was understood...to apply to activities of the United States directed against aliens in foreign territory or in international waters. [citation omitted].'" Kasi, 508 S.E.2d at 63, Appendix at 12.

Prior to trial, petitioner also moved to dismiss the charges against him on grounds that the trial court did not have jurisdiction over him. Id. at 62, Appendix at 8-9. In the alternative, petitioner asked that evidence resulting from his abduction from Pakistan in violation of the Extradition Treaty between the United States and Pakistan and the Vienna Convention on Consular Relations be suppressed. Id. at 62, 63-64, Appendix at 8-9.

The trial court denied each of these pretrial motions, Appendix at 54-55, 57, 59-62, and the Virginia Supreme Court affirmed stating that the Court's decision in United States v. Alvarez-Machain, 504 U.S. 655 (1992), controlled and that the Vienna Convention on Consular Relations does not give individuals any legal, enforceable rights. Kasi, 508 S.E.2d at 63, 64, Appendix at 11-12, 13.

The Virginia Supreme Court also conducted a proportionality review of his death sentence mandated by Virginia statute. Id. at 68, Appendix at 22-23; see VA. CODE ANN. §17-313(C)(2). The court upheld petitioner's eligibility for death on the basis of the "vileness" factor. Id., Appendix at 23. The court reviewed the record in the case which did not contain any documents from the CIA or FBI, compared the sentence in Petitioner's case to those imposed for supposedly similar crimes in Virginia, and concluded that the trial court's sentence was "not excessive or disproportionate." Id.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG LOWER COURTS AS TO THE STANDING OF ALIENS TO CLAIM THE PROTECTION OF THE FOURTH AMENDMENT.

In this case, the Supreme Court of Virginia held that petitioner, regardless of his contacts with the United States,[7] lacked standing to claim that his seizure violated the Fourth Amendment because it took place overseas. Kasi, 508 S.E.2d at 63. As a consequence, the Virginia Supreme Court squelched petitioner's Fourth Amendment challenge to the reasonableness of his seizure—a challenge which, based on the facts, would likely have been successful. [8]

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[7] Petitioner legally lived and worked continuously in the United States for nearly two years, had substantial voluntary and legal contacts in the United States and was seized in Pakistan by federal agents based on alleged conduct that occurred exclusively in the United States.

[8] Neither the trial court nor the Supreme Court of Virginia ruled whether the government's seizure of petitioner was reasonable. However, the FBI and CIA officers clearly acted unreasonably when they entered his hotel room at four in the morning without identifying themselves, gained physical control over him through the use of force, molested him, placed a hood over his head, gagged, handcuffed and shackled him, transported him in a van for almost an hour, placed him on a plane for over an hour, placed him in another van for almost an hour, held him in a cell for two days and then flew with him on a twelve hour flight to the United States.

The decision of the Virginia Supreme Court generally follows the decisions of the Fifth Circuit Court of Appeals on the issue of Fourth Amendment standing, but conflicts with decisions of the Ninth Circuit Court of Appeals and the Supreme Court of Florida. Conflict in lower court decisions also exists on the issue of whether an alien bears the burden of proving standing. The Court should grant certiorari to resolve the conflict on these issues of significant constitutional importance.

In United States v. Verdugo-Urquidez, the Court, in a plurality decision, found that a Mexican citizen and resident, who had no substantial voluntary connections with the United States, lacked standing to challenge under the Fourth Amendment the search of his home by agents of the United States government. 494 U.S. 259, 274-275 (1990). The Court ***did not*** rule that the Fourth Amendment is inapplicable to an extraterritorial search or seizure.[9] See United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995), cert. denied, _U.S._, 116 S.Ct. 813 (1996); Reichmann v. State of Florida, 581 So. 2d 133, 138 (Fla. 1991). Nor did this Court rule that only resident aliens are "people" deserving of the protection of the Fourth Amendment. See Verdugo, 494 U.S. at

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[9] Compare Verdugo, 494 U.S. at 270, 274-275 ("he was a citizen and resident of Mexico with no voluntary attachment to the United States, ***and*** the place searched was located in Mexico") (emphasis added) with Verdugo, 494 U.S. at 277, 278 (Kennedy, J., concurring) ("the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a non-resident alien... [i]f the search had occurred in a residence with the United States, I have little doubt that the full protections of the Fourth Amendment would apply").

271-272, 272-273, 279 (Stevens, J., concurring), 282 (Brennan, J., dissent); see also United States v. Guitterez, 983 F.Supp. 905, 915-916 (N.D.Cal. 1998); United States v. Tehrani, 826 F.Supp. 789, 793-794 n.1 (D.Vt. 1993), affirmed, 49 F.3d 54 (2nd Cir. 1995). Indeed, the Court in Verdugo specifically limited its holding to the circumstances of an alien who had no voluntary connection with the United States and whose home was outside the United States and stated that the Fourth Amendment rights of an alien depend on his voluntary contacts with the United States. Verdugo, 494 U.S. at 274-275.

Since the decision in Verdugo, the Supreme Court of Florida has held that aliens can claim the protection of the Fourth Amendment regarding searches conducted by United States government agents abroad. Reichmann v. State of Florida, 581 So. 2d 133, 138 (Fla. 1991). In Reichmann, the Florida Court found that a German citizen and resident who had been legally visiting the United States for less than a month had standing to challenge the search of his property by United States agents in Germany. 581 So. 2d at 138. Similarly, the Ninth Circuit Court of Appeals has held that an alien who had substantial voluntary connections to the United States can challenge United States government searches and seizures abroad. United States v. Juda, 797 F.Supp. 774, 781 (N.D.Cal. 1992) (resident alien has standing to challenge federal government's search and seizure abroad), affirmed, 46 F.3d 961 (9th Cir. 1995); see Barona, 56 F.3d at 1093, 1094 (acknowledging that this question remains undecided and assuming for purposes of the motion that alien had standing to challenge conduct abroad).

To the contrary, the Fifth Circuit Court of Appeals has held that an alien who has substantial voluntary connections to the United States does not have standing to challenge the federal government's conduct abroad. United States v. Cardenas, 9 F.3d 1139, 1157 n.8 (5th Cir. 1993) (resident alien cannot challenge federal government conduct taking place in another country), cert. denied, _U.S._, 128 L.E.2d 876 (1994). Similarly, in this case, the Virginia Supreme Court found that petitioner, despite his residence at one location in the United States for approximately two years, could not assert a Fourth Amendment challenge to his seizure by FBI agents in Pakistan. Kasi, 508 S.E.2d at 63, Appendix at 12.

As to who bears the burden of proof on Fourth Amendment standing, the Virginia trial court found that petitioner bore the burden of proving standing while the Federal District Court for the Northern District of California declined to place a higher burden on a non-citizen defendant moving to suppress evidence resulting from unreasonable United States government conduct. Compare Guitterez, 983 F. Supp. at 916 ("[g]iven the lack of any clear appellate guidance which alters the applicable standard...the court is disinclined to impose a greater burden on this category of criminal defendants as a prerequisite to seeking the shelter of the Fourth Amendment") with Kasi, Appendix at 43 ("[Petitioner] has to make a prima facie case to show that he is entitled to claim [the] protection [of the Fourth Amendment]...").

Had petitioner been prosecuted in the state court in Florida or the federal district court in California, the trial court would have found that petitioner has standing—petitioner lived, worked, held a

driver's license, maintained car insurance, invested in business, and participated in civic and religious activities in the United States as a legal alien for approximately two years, and the incident that gave rise to his seizure occurred in the United States during his legal residence—and proceeded to evaluate the reasonableness of the FBI's seizure. Evaluation of petitioner's seizure would expose its unreasonableness and result in the suppression of petitioner's confession.

The ability to challenge government conduct that violates the Fourth Amendment is crucial to the protection of defendants' interest in privacy and bodily integrity and the prevention of unlawful government conduct. See Guitterez, 983 F.Supp. at 911 (citing Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978)). The remedy relative to these issues on which the conflict exists—exclusion of the unlawfully obtained evidence—is outcome-determinative and resolution of these conflicts will ensure that similarly situated defendants, including petitioner, are not treated differently solely because of the court in which their cases are heard.

II. THIS COURT SHOULD ADDRESS THE QUESTION LEFT OPEN IN ALVAREZ-MACHAIN AS TO WHETHER VIOLATIONS OF MANDATORY EXTRADITION PROCESS IN TREATIES TO WHICH THE UNITED STATES IS A PARTY IMPAIR AN AMERICAN COURT'S PERSONAL JURISDICTION OVER DEFENDANTS.

Article 8 of the Extradition Treaty between the United States and the Republic of Pakistan provides:

> The extradition of fugitive criminals under the provisions of this Treaty shall be carried out...**in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed**. [emphasis added]. 47 Stat. 2122 (1931), Appendix at 71.

Act XXI of the Republic of Pakistan ("Extradition Act, 1972") implements the Extradition Treaty and sets forth an exclusive extradition procedure. The Pakistan Code, Volume XVIII. Chapter II, Section 6 of Extradition Act, 1972 provides:

> 6. Requisition for surrender of fugitive offender. A requisition for the surrender of a fugitive offender **shall be made** to the Federal Government...[emphasis added]. Appendix at 87.

Article 36(2) of the Vienna Convention on Consular Relations confers a national of a signatory country with the right to be advised that he can communicate with his country's consul without interference immediately upon his detention by agents of a foreign state. 21 U.S.T. 77 (1963), Appendix at 100.

In this case, petitioner was kidnapped by four (4) FBI agents, handcuffed, shackled and hooded, and taken by car and airplane to a facility controlled by Pakistanis. After two days at this facility under continuous supervision by the FBI agents, the petitioner was turned over to the custody of the agents. The agents

took petitioner to an airport from which he and the agents were flown to the United States.

The United States did not make a requisition to the Federal Government of Pakistan or advise him of his right to unfettered contact with his consulate. Kasi, 508 S.E.2d at 62, Appendix at 9. In fact, petitioner was not advised of his right to contact his consulate until the Commonwealth's attorney wrote to the defense counsel fourteen days after his return to the United States. Id.

Despite the lack of the required requisition and the failure to advise petitioner of his rights under the Vienna Convention, the Virginia Supreme Court found that the trial court had personal jurisdiction because of this Court's ruling in United States v. Alvarez-Machain, 504 U.S. 655 (1992). Id. at 63, Appendix at 8. The Virginia Court stated that petitioner's abduction did not violate the Extradition Treaty between the United States and Pakistan, because nothing in the Treaty prohibited the abduction or required that sanctions be imposed for an alleged violation of the Treaty. Id.

The Virginia Supreme Court also found that the Vienna Convention did not require the FBI agents to notify petitioner of his right to contact Pakistani authorities because petitioner was "turned over" to Pakistani authorities and that, as soon as the petitioner was returned to the United States, the prosecutor notified the defense that petitioner had the right to contact the Pakistani consulate. Id. at 64, Appendix at 9.

Both of these findings are erroneous and outcome-determinative. The failure to follow the mandatory extradition

procedure set forth in the Extradition Act, 1972 deprived the Virginia court of personal jurisdiction over petitioner in violation of petitioner's Fourteenth Amendment right to due process.

In Alvarez-Machain, the Court held that the forcible abduction of a Mexican citizen in Mexico at the direction of DEA agents is not prohibited by the Extradition Treaty between Mexico and the United States. 504 U.S. at 670. The Court reasoned that the forcible abduction was permissible because the Extradition Treaty did not provide for a mandatory extradition process or expressly bar kidnapping by government agents. Id. at 666, 669; Ker v. Illinois, 119 U.S. 436 (1886); see also Frisbie v. Collins, 342 U.S. 519 (1952). Unlike the situation in Alvarez-Machain, the Treaty between the United States and Pakistan, implemented by the Extradition Act, 1972, specifically provides for exclusive use of the requisition procedure in the extradition process, especially where officials of both counties are involved in the process.

Since no such requisition was ever made for petitioner after he was held in the facility controlled by the Pakistanis and before he was "turned over" to the custody of the FBI agents, the Virginia Court had no jurisdiction over petitioner. Indeed, the four (4) FBI agents simply ignored the mandatory extradition procedure despite the Extradition Treaty's status as the supreme law of the United States. In essence, the Extradition Act, 1972 provides "the only way by which one country may gain custody of a national of the other country for purposes of prosecution," and the Ker-Frisbie doctrine does not apply. Alvarez-Machain, 504 U.S. at 664; see United States v. Rezaq, 134 F.3d 1121, 1130 (D.C. Cir. 1998), cert.

denied, _U.S._, 119 S.Ct. 90 (1998); United States v. Noriega, 117 F.3d 1206, 1213 (11th Cir. 1997), cert. denied, _ U.S. _, 118 S.Ct. 1389 (1998); United States v. Matta-Ballesteros, 71 F.3d 754, 763 (9th Cir. 1995), modified, 98 F.3d 1100 (9th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).

In stating that no sanctions were required, the Virginia Supreme Court chose to ignore the clear rule of law that, where the trial court lacked personal jurisdiction, the Fourteenth Amendment requires reversal without prejudice and the suppression at any new trial of evidence obtained in the unconstitutional process through which the presence of the defendant was secured.

Furthermore, the Vienna Convention grants an individual the right, when seized by agents of a foreign state, to immediately consult with his own government's consulate. Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring), cert. denied, 523 U.S. 371 (1998). The rationale for this right is evident, i.e., unfettered consultation ensures individual rights and the rule of law. The Virginia Supreme Court is simply in error in ruling that the rationale is satisfied because petitioner was held for two days in a facility controlled by Pakistanis. Kasi, 508 S.E.2d at 64, Appendix at 9. During those days, the FBI agents maintained continuous surveillance of petitioner and did not give petitioner any opportunity to consult, independently or otherwise, with personnel of the foreign office of Pakistan—much less advise him of his right to do so.

The Virginia Supreme Court is plainly wrong in stating that as soon as petitioner returned to the U.S. the defense was

advised that petitioner could contact his consulate. Id. The record clearly shows that such advice was not given until July 3, 1997, some fourteen days after his return and well after petitioner had been subjected to extensive interrogation and had given a statement to one of his abductors.

Neither the United States nor the Republic of Pakistan or any other nation-state with an extradition law compelling a mandatory extradition process or which is a signatory to the Vienna Convention can ignore these laws. They *are* the supreme laws of the United States. U.S. CONST. art. VI, cl. 2. All unlawful attempts to obtain jurisdiction over a person protected by such laws fail and violate the person's Fourteenth Amendment rights. The Court should grant the Petition and clarify its decision in Alvarez-Machain, especially in situations where a foreign state's extradition law provides for an exclusive extradition process.

III. THE COURT SHOULD CORRECT THE LOWER COURTS' EXPANSION OF THE RULE IN TOUHY BECAUSE THAT EXPANSION DEPRIVES CRIMINAL DEFENDANTS OF CONSTITUTIONAL RIGHTS TO EXCULPATORY AND MITIGATING EVIDENCE.

The Virginia courts deprived petitioner of his Sixth Amendment right to compulsory process and his Fourteenth Amendment rights to due process and equal protection when the courts failed to compel the FBI and CIA to produce documents likely to contain exculpatory and mitigating evidence.

The FBI and CIA refused to comply with subpoenas for such documents, citing regulations adopted pursuant to the

Housekeeping Statute, 5 U.S.C. § 301,[10] this Court's opinion in U.S. ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), and other lower court opinions that have expanded Touhy. The Virginia trial court agreed, finding no power to order the CIA or the FBI to produce the documents—even for the court's *in camera* review. The trial court did not review the documents, nor petitioner's reasons for the requests. The Virginia Supreme Court summarily affirmed. Kasi, 508 S.E.2d at 60, Appendix at 4, 5.

A. This Court Did Not Create A New Federal Privilege In Touhy.

In Touhy, this Court ruled that a state court cannot hold a subordinate of a federal agency in contempt for refusing to comply with a state-issued subpoena because of his superior's instructions not to do so, when the federal agency's regulations enacted pursuant to the Housekeeping Statute require that he follow his superior's instructions. 340 U.S. at 466-467, 468. The Touhy Court expressly declined to determine whether the agency superior has the authority to refuse to produce the documents sought, whether the federal agency may properly refuse to produce such information when the information is sought in the context of a criminal prosecution, and whether the federal agency can refuse to produce such documents because of national secrets contained therein. Id. at 467, 468.

Despite the Court's narrow ruling in Touhy, lower courts have expanded that decision to stand for the principle that state

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[10] 28 C.F.R. §§ 16.21-16.29; 32 C.F.R. §§ 1905.1-1905.4.

courts can *never* enforce subpoenas against federal agencies. The lower courts began this expansion of Touhy by reference to the principle of sovereign immunity.[11] See U.S. v. Williams, 1999 U.S. App. LEXIS 3843 (4th Cir. 1999); Smith v. Cromer, 159 F.3d 875, 881 (4th Cir. 1998); Houston Business Journal, Inc. v. Office of the Comptroller of Currency, U.S. Dep't of Treasury, 86 F.3d 1208, 1211 (D.C. Cir. 1996); Edwards v. United States Dep't of Justice, 43 F.3d 312, 315 (7th Cir. 1994); State of Louisiana v. Sparks, 978 F.2d 226, 236 (5th Cir. 1992); Ferrell v. Yarberry, 848 F.Supp. 121, 123 (E.D. Ark. 1994).

However, instead of applying the Court's actual holding in Touhy and the doctrine of sovereign immunity, the lower courts created a mutation that acts as a federal privilege. E.g., Williams, 1999 U.S. App. LEXIS 3843 at *10; Smith, 159 F.3d at 879; Houston Business Journal, 86 F.3d at 1212 n. 4, 1213; Edwards, 43 F.3d at 314, 315, 316; Tholen Supply Co., Inc. v. Continental Cas. Co., 859 F.Supp. 467, 469 (D.Kan. 1994); State of Louisiana v. Parker, 661 So. 2d 603, 611 (La. App. 2 Cir. 1995), appeal denied, 667 So. 2d 1049 (La. 1996); see Sparks, 978 F.2d at 236 n. 18. This mutation actually ignores the long-standing rulings of this Court that the doctrine of sovereign immunity is inapplicable when

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[11] Sovereign immunity precludes state governments from interfering with the federal government's conduct of its business, Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989); see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949), and bars state court actions against the federal government. Maddox v. Williams, 855 F.Supp. 406, 414 (D.D.C. 1994), affirmed, 62 F.3d 408 (D.C.Cir. 1995); Smith v. Cromer, 159 F.3d 875, 879 (4th Cir. 1998).

the federal agent acts unconstitutionally, Dugan v. Rank, 372 U.S. 609, 621-622 (1962); Smith, 159 F.3d at 884 (Phillips, J., dissenting); see Larson, 337 U.S. at 690, and that the courts must determine whether any privilege can be legitimately asserted when there is a countervailing constitutional interest.[12] United States v. Nixon, 418 U.S. 683, 708, 709 (1974).

Lower courts applying the mutation to state criminal defendants' subpoenas for documents and testimony—like the Virginia trial court—accept the federal agencies' bare assertions of "privilege" and find that the agencies are immune from compulsory process. E.g., Williams, 1999 U.S. App. LEXIS 3843 at *8-9; Smith, 159 F.3d at 881; In re Gray, 1998 U.S. App. LEXIS 25779 (10th Cir. 1998).[13]

These courts fail to evaluate whether or acknowledge that the agencies' refusal to provide the information could or does

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[12] The mutation also ignores Congress' amendment of the Housekeeping Statute in 1958 to prevent this very occurrence. See Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979).

[13] See also McClure v. United States, 1995 WL 299849 (9th Cir. 1995); New York v. Kronberg, 672 N.Y.S.2d 63, 243 A.D.2d 132, 154 (N.Y. App. Div. 1998), appeal denied, 678 N.Y.S.2d 27 (N.Y. 1998); Ohio v. O'Neal, 1985 Ohio App. LEXIS 6819 (Ohio Ct. App. 1985); Nebraska v. Rice, 335 N.W.2d 269, 277 (Neb. 1983); In re Pratt, 170 Cal.Rptr. 80, 112 Cal.App.3d 795, 880 (Cal.Ct.App. 1980); Massachusetts v. Manning, 359 N.E.2d 51, 53-54 (Mass. App. Ct. 1977), reversed on other grounds, 367 N.E.2d 635 (1977); State of Louisiana v. Andrews, 250 So. 2d 359, 366 (La. 1971); Alexander v. Texas, 450 S.W.2d 70, 72 (Tex. Crim. App. 1970); see Sparks, 978 F.2d at 234-236.

violate the criminal defendants' Sixth and Fourteenth Amendment rights to exculpatory and mitigating evidence. Commonwealth of Pennsylvania v. Smith, 208 A.2d 219, 223, 225, 229 (Pa. 1965) (court reversed defendant's conviction because trial court violated defendant's rights to compulsory process and due process when it failed to compel FBI to produce information); New York v. Heller, 483 N.Y.S.2d 540, 126 Misc. 2d 575, 577, 578 (N.Y. Sup. Ct. 1984) (court denied federal government's motion to quash subpoena because granting the motion would deprive criminal defendant of his rights to compulsory process and due process); Buford v. Georgia, 282 S.E.2d 134, 137, 138 (Ga. Ct. App. 1981) (court reversed defendant's conviction because trial court deprived him of his right to compulsory process when it refused to compel the DEA to produce exculpatory information).

"It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 57 (1987)); Nixon, 418 U.S. at 711-712 ("allowance of the privilege...relevant in a criminal trial [] cut[s] deeply into the guarantee of due process of law and gravely impair[s] the basic function of the courts"); cf. Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (informer's privilege must give way if informant's identity is relevant to defense).

By failing to consider the criminal defendant's constitutional rights, the lower courts abdicate their responsibility to assess application of the doctrine of sovereign immunity and the legitimacy of the assertion of the "privilege." See Nixon, 418 U.S.

at 705; United States v. Reynolds, 345 U.S. 1, 9-10 (1953) ("Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers").

B. *In Camera* Review Would Protect Each Party's Interests.

At the very least, when faced with a defendant, like petitioner, in a state court criminal prosecution who is seeking exculpatory and mitigating information from a federal agency, the court should first review the information sought and held by the federal agency *in camera*. See Nixon, 418 U.S. at 711, 712, 713-714 (importance of privilege must be weighed against the detriment caused thereby to the guarantee of due process in the criminal justice system); Reynolds, 345 U.S. at 12; State of Florida v. Cohen, 887 F.2d 1451, 1455 (11th Cir. 1989) (remand to district court necessary for balancing of criminal defendant's interest in having potentially exculpatory evidence withheld by federal agency on claim of privilege with federal government's interest in protecting the flow of information in light of new facts); Ohio v. Lanci, 1980 Ohio App. LEXIS 12552 at *29-30 (Ohio Ct. App. 1980) (trial court properly reviewed FBI documents to determine whether criminal defendant's interest outweighed the government's interest); New York v. Santos, 368 N.Y.S.2d 130, 140 (N.Y. Sup. Ct. 1975); Elson v. Brown, 436 P.2d 12, 16-17 (Nev. 1967); see also Smith. 159 F.3d at 881; cf. Ritchie, 480 U.S. at 58 (criminal defendant was entitled to have trial court review file withheld by state on claim of privilege for exculpatory evidence); United States v. Bizzard, 674 F.2d 1382, 1386 (11th Cir.

1982) (trial court properly conducted *in camera* review of personnel file held by FBI when determining whether federal government was obligated to produce file to defendant pursuant to Brady v. Maryland, 373 U.S. 83 (1963)), cert. denied, 459 U.S. 973 (1982).

In camera review of the documents would allow for the protection of any government interest and ensure that any such interest is not unduly exercised at a sacrifice of "the fair administration of criminal justice." Nixon, 418 U.S. at 711-712; Smith, 159 F.3d at 885 (Phillips, J., dissenting) ("the right is not adequately protected by the court's simply accepting the government's proffer of non-materiality without conducting its own inspection").

Indeed, to hold otherwise would create an anomaly. Commonwealth of Pennsylvania v. Smith, 208 A.2d at 225. Were the criminal defendant being tried by the federal government in the federal court, he would be entitled to information held by federal agencies. See, e.g., Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774, 778, 780 (9th Cir. 1994) (neither Touhy nor the doctrine of sovereignty prevent a federal court from ordering a federal agency to comply with a subpoena); National Labor Relations Board v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961) (federal agency cannot assert blanket privilege—rather federal court determines whether federal agency can refuse to produce documents); Connaught Labs., Inc. v. SmithKline Beecham P.L.C., 7 F.Supp.2d 477, 479, 480 (D.Del. 1998) (federal

court can enforce subpoena against federal agency), appeal dismissed, 165 F.3d 1368 (Fed.Cir. 1999).

Likewise, if the investigation was conducted by the state prosecutor or state agencies rather than federal agents, the criminal defendant would be entitled to the information. See, e.g., Ritchie, 480 U.S. at 56, 57 (state prosecution must turn exculpatory and mitigating evidence over to criminal defendant); Commonwealth of Pennsylvania v. Smith, 208 A.2d at 225 (criminal defendant entitled to exculpatory information held by state).

C. This Case Is An Appropriate Vehicle For The Court To Clarify Its Decision In Touhy.

The Court has not addressed the "privilege" created by the lower courts' mutation of Touhy. However, in Smith v. Pennsylvania, 376 U.S. 354 (1964), this Court granted certiorari where the petitioner, a criminal defendant, claimed that the state trial court denied him the due process of law and deprived him of his right to compulsory process when it failed to compel the FBI to produce documents to him. The FBI was investigating the circumstances surrounding the crime for which the petitioner was arrested, so the petitioner subpoenaed the FBI. The trial court granted the FBI's motion to quash the subpoena and the Pennsylvania Supreme Court affirmed.

This Court, in response to the petition for a writ of certiorari, asked the Solicitor General for its position. The Solicitor General reported that the only objection to the subpoena was its breadth and indicated that there would be no objection to a narrower subpoena. This Court granted the petition and remanded

the case to the Pennsylvania Supreme Court for reconsideration in light of the Solicitor General's statement. 376 U.S. at 355. On remand, the Pennsylvania Supreme Court reversed the conviction because the trial court's failure to compel the FBI to produce the documents denied the petitioner his rights to compulsory process and due process. Commonwealth of Pennsylvania v. Smith, 208 A.2d at 229.

This Court has made it clear that the Virginia trial court's failure to review the information held by the FBI and CIA is reversible error if the information is material to petitioner's guilt or punishment. Ritchie, 480 U.S. at 58; see Kyles v. Whitley, 514 U.S. 419, 434 (1995) (the question is whether the inability to have the information "undermines confidence in the outcome of the trial").

Here, petitioner made a plausible showing of the existence, materiality and favorable quality of the documents held by the FBI and CIA. See Ritchie, 480 U.S. at 60 n.15. The FBI and CIA have documents regarding petitioner and petitioner's family because of their investigation of petitioner as a suspect in the killing of the CIA agents and also because of petitioner's family's previous history with the ISI and CIA.

These documents would have supported petitioner's motion to suppress evidence obtained as a result of his unreasonable seizure. The documents concerning the FBI's seizure of petitioner would expose its unreasonableness and the failure of the United States to comply with the mandatory extradition process set forth in the Extradition Act. The documents concerning the communications

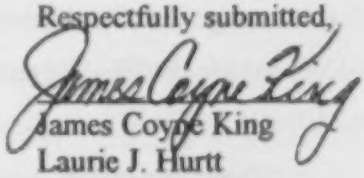
among the ISI, CIA and petitioner's family, the killing of petitioner's relative, and the CIA's involvement in the issuance of an amnesty and work permit to petitioner would have provided the jury a reasonable explanation for any reaction by petitioner to the CIA's interference with Islamic affairs and given petitioner another avenue for convincing the jury and the court to spare his life.

Independent of petitioner's interest, the broader and more important question is whether federal agencies can conduct investigations, arrest individuals and turn them over to the states for prosecution in order to avoid producing exculpatory and mitigating evidence that they would otherwise have to produce in federal prosecutions. The Court should exercise its jurisdiction pursuant to 28 U.S.C. § 1257(a) and review the extension of Touhy by the lower courts in state criminal cases which implicate defendants' Sixth and Fourteenth Amendment rights.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Court grant the Petition For A Writ of Certiorari.

Respectfully submitted,



James Coyne King
Laurie J. Hurtt
HANIFY & KING
Professional Corporation
One Federal Street
Boston, MA 02110
(617) 423-0400
Counsel for Petitioner

Elwood Earl Sanders, Jr.
Commonwealth of Virginia
Public Defender Commission
701 East Franklin Street
Richmond, VA 23219
(804) 225-3297
Of counsel

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